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No. 80-2217

Supreme Court of the United States

OCTOBER TERM, 1980

SELIGMAN & ASSOCIATES, INC.,
Petitioner,

-v-

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals lack jurisdiction under Section 10(f) of the National Labor Relations Act, 29 USC 160(f), to review the merits of the Board's unit determination when that determination was unnecessary to the Board's decision, was the subject of a pending review in another proceeding, and neither party in this case was an aggrieved party under Section 10(f) since they agreed that the unit determination should be decided in the other proceeding?

2. If the Court of Appeals had jurisdiction to review the unit determination, did it have the discretion to abstain from deciding that issue when it was the subject of a pending review in another proceeding and both parties stipulated that the unit determination should be decided in the other proceeding?

3. Was the Court of Appeals wrong in approving the unit determination where the sole evidence relied on by the General Counsel was the transcript, exhibits, and decision from another proceeding and the Administrative Law Judge (ALJ) ruled that she was required to admit such evidence regardless of its hearsay nature and regardless of the availability of the same witnesses to appear and testify?

4. Was the Court of Appeals wrong in finding that certain claims of unfair labor practices were not barred by the statute of limitations, express waiver, or estoppel?

5. Did the Court of Appeals incorrectly apply the standard of review set out in **Universal Camera Corp v NLRB**, 340 US 474 (1951), when it held that the Board's findings of an employer-employee relationship, an appropriate unit, and the commission of unfair labor practices were supported by substantial evidence?

6. When the Court of Appeals ordered enforcement of notice posting at all 21 of the apartment complexes managed by petitioner rather than at the few complexes where unfair labor prac-

tices were found, did it incorrectly apply the standard of review by implicitly approving the Board's underlying factual justification for finding that remedy appropriate?

7. Was the Court of Appeals wrong in finding only partial compliance with the Board's reinstatement order when in fact the Board expressly deferred consideration of this question and made no factual finding about compliance?

8. Is an order requiring offers of reinstatement to certain employees, and a notice including that language, beyond the authority of the Board and Court of Appeals, as moot or otherwise, or an abuse of discretion, when unconditional offers of reinstatement were served on the employees and in evidence at the hearing?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears in the appendix.

The decision and order of the National Labor Relations Board, 240 NLRB No. 10 (1979), and the decision and order of the Administrative Law Judge, affirmed and adopted by the Board, also appear in the appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit were dated and entered on January 21, 1981. The Court denied petitioner's request for a rehearing on April 30, 1981. This petition for certiorari was filed within the 90 day period prescribed by 28 USC 2101(c) and Supreme Court Rule 20. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTES AND RULES INVOLVED

Jurisdiction For Review Of Board
Order And Standard Of Review

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . . [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive. Section 10(f), National Labor Relations Act ("NLRA"); 29 USC 160(f).

Provisions Regarding Unfair
Labor Practice Proceedings

> Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of

civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28. Section 10(b) NLRA, 29 USC 160(b).

Every party has a right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . . 29 CFR 101.10(b)(2).

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(b).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FRE 801(c).

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. FRE 802.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: Testimony given as a witness at another hearing of the same or a different proceeding . . . . FRE 804(b)(1).

Provisions Regarding
Representation Proceedings

The hearing . . . is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing . . . is nonadversary in character . . . . 29 CFR 101.20(c).

The rules of evidence prevailing in courts of law or equity shall not be controlling. 29 CFR 102.66(a).

Statute Of Limitations
For Filing Of Charges

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . . §10(b) NLRA, 29 USC 160(b).

Complaints, orders, and other process and papers of the Board . . . may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. Section 11(4) NLRA, 29 USC 161(4).

Charges . . . may be served personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. 29 CFR 102.111(a).

STATEMENT OF THE CASE

Petitioner Seligman & Associates, Inc. ("Seligman"), through its unincorporated division Scott Management Company, has management contracts to manage 21 separate apartment complexes in Southeastern Michigan. The claims in this unfair labor practice case arose out of a union organizing effort at some of the apartment complexes managed by Seligman.

Of the complexes which Seligman contracts to manage, 19 are owned by separate partnerships. Two are owned by Seligman. The complexes have a separate practical identity, with separate names, separate advertisements under their own names, and separate business addresses. They are geographically far apart, with distances as great as 85 miles. They were built at different times, are different sizes ranging from over 300 units to under

100 units, and serve different income classes of tenants.

All but 4 of the complexes are HUD-financed. These complexes are subject to HUD regulations which require that all on-site personnel be employees of the complex owner and not the management company.

The employees' salaries and all other project expenses are paid out of the income of each complex. Seligman does not share in the profit or loss of any complex. For convenience, checks are issued in the name of Scott Management Company, but the accounts are kept strictly separate.

Labor matters are largely controlled by the resident managers at each complex.

The complaint issued by the Board alleged unfair labor practices occurring between December 1976 and May 1977 at only a few of the 21 complexes managed by Seligman. Seligman argued that the suggested 21-complex unit was not appropriate and that it was not the employer of the people working at the individual complexes not owned by Seligman.

During the same time that the Board considered the unfair labor practice charges and issued its complaint and various amendments to the complaint, the Board was also considering a petition for an election filed by the union on December 8, 1976 (the representation case). The representation case petition also claimed that certain employees in the 21 separate apartment complexes together constituted an appropriate unit. After a lengthy hearing in that case, the Regional Director filed a decision which sustained the requested unit. Seligman filed a request for review of the Regional Director's decision.

After the Regional Director's decision in the representation case, the Board amended its unfair labor practice complaint to request a bargaining order. Because of this request for a bargaining order, proceedings in the representation case were suspended pending decision in the unfair labor practice case.

Since a bargaining order was requested in the unfair labor practice case, the General Counsel introduced evidence on the question of an appropriate unit. Over Seligman's objection, he introduced the transcript, exhibits, and decision from the representation case as its sole evidence on the question of an appropriate unit. Most of the witnesses whose transcripts were admitted actually testified at the unfair labor practice hearing, but not on the question of an appropriate unit. The other witnesses whose transcripts were admitted were available to testify at the unfair labor practice hearing. The ALJ ruled nonetheless that she was required to admit this record from the representation case regardless of its hearsay nature and regardless of the availability of the same witnesses to appear and testify in the unfair labor practice case.

With regard to the unfair labor practice charge by David and Susan Younce, Seligman argued that it was barred by the statute of limitations, express waiver, or estoppel. The Younces were terminated on October 7, 1976. Shortly after, Susan Younce filed an unfair labor practice charge. Seligman quickly offered reinstatement to the Younces when the Board informed it of the charge. In the meantime, Susan Younce decided to drop the charge because she was afraid the government might learn she was collecting welfare benefits while working. The Board agent opposed her dismissing the charge.

Susan Younce then contacted an officer of Scott Management to advise them that she wanted to drop the charge. She met with an attorney for Scott and executed a lengthy affidavit reciting the factual background. He assisted her, at her request, in preparing a formal letter to the Board seeking to withdraw the charge because she and her husband had other jobs they would rather have and they did not want back pay. Eventually the Board permitted her to drop the charge.

On April 7, 1977 the Younces filed a second charge. This was the last day for filing and serving the charge under the six-month statute of limitations. The only service made on that day was on the resident manager at Eureka Townhouses, the com-

plex at which the Younces had been employed. The charge was not served at the Scott Management office in Southfield, Michigan, which was listed as the address of the respondent in the charge itself.

Seligman argued that, under these circumstances, the charge was not properly filed and served within the limitations period. Alternatively, Seligman argued that Younce's lengthy affidavit and letter to the Board withdrawing the first charge expressly waived her rights and that the Younces were estopped from seeking reinstatement and back pay because they rejected a reinstatement offer one month after their termination.

In one of the early sessions of the unfair labor practice hearing, Seligman distributed written reinstatement offers directly or through the union representative to all individuals except one covered by the reinstatement order as enforced by the Court of Appeals. These offers were made part of the record at the hearing.

The ALJ's decision held that the requested 21-complex bargaining unit was appropriate and that Seligman was the employer of the employees at each complex. The decision, however, denied the request for a bargaining order because the proofs did not show majority support for the union in the requested bargaining unit. The decision also found some of the unfair labor practice allegations supported by the evidence, including the termination of the Younces. It rejected the statute of limitations, waiver, and estoppel defenses. The ALJ recommended a cease and desist order, reinstatement with back pay of the employees found improperly discharged, and posting of a notice regarding the decision at all 21 complexes.

On appeal the Board adopted the ALJ's decision and order. Seligman filed a petition for review in the Court of Appeals for the Sixth Circuit and the Board filed a cross-petition for enforcement of the order. Jurisdiction in the Court of Appeals was pursuant to Section 10(e) and (f), 29 USC 160(e) and (f). The Court of Appeals affirmed the Board's decision in all

respects.

Despite the fact that neither party sought review of the merits of the unit determination, the Court of Appeals addressed that question and affirmed the Board's finding. Seligman argued that the unit determination was gratuitous dictum, since no bargaining order was issued. Seligman argues that it was therefore improper for the ALJ to decide this question and that the court should rule that the unit determination in this case was not binding in the representation case where review of the same question was still pending. The Board did not even brief the merits of the question and, in a footnote reference, suggested that the court had no jurisdiction to review the unit determination because Seligman was not an "aggrieved party" under Section 10(f) with respect to this question, since no bargaining order had been issued.

At oral argument before the Court of Appeals, one panel member inquired about the issue and stated that the unit determination was not binding in the representation case. Seligman's counsel then stated he would not pursue those issues and requested the panel to indicate in its opinion that the unit findings were not binding in the representation case. Counsel for the Board concurred in the legal conclusion at oral argument.

Despite the agreement of the parties and the apparent position of one panel member, the Court of Appeals opinion stated that the Court was required to review the unit determination and affirmed it on the merits. Seligman's motion for rehearing on this question was denied.

REASONS FOR GRANTING THE WRIT

The decisions below that the court was obliged to review the merits of the unit determination and that the incorporation of the record from the representation case in the unfair labor practice case was proper decided important questions of federal law which have not been, but should be, settled by this Court.

The Court of Appeals decision exhibits numerous errors which call for the exercise of this court's power of supervision.

Decision On The Merits
Of The Unit Determination

Despite the parties' agreement that the merits of the unit determination should not be considered in this case but rather should be reviewed in the normal course of the repesentation case, the Court of Appeals decided the question. It appears that the court thought it was required to decide this question. It stated:

> The Administrative Law Judge addressed the question, however, and our function is to decide whether his [sic] unit determination is supported by substantial evidence. . . . That the decision on the request for a bargaining order did not require a unit determination is of no concern to this Court.

Slip Opinion, p 3; A 3.

It was Seligman's position before the ALJ and in the Court of Appeals that, since no bargaining order was issued, the unit determination was unnecessary.

Unnecessarily reaching the merits of this issue is highly prejudicial to Seligman. Seligman has a presently pending request for direct review of the decision in the representation case. A decision here, based almost solely on the incorporated record from the representation case, is effectively a collateral review of the decision in the representation case. It would preempt Seligman's right of direct review in the representation case. There is no provision in the law or applicable regulations for such short-circuiting of the process in a representation case.

A decision on the merits of the unit determination was wrong for two reasons. First, the Court of Appeals ignored an important question of subject matter jurisdiction. Since no bargaining

order was entered, that portion of the Board's complaint did not result in a remedial order against Seligman. Since there was no remedial order against it, Seligman was not an "aggrieved party" under Section 10(f) and was not entitled to seek review of the unit determination. **UAW v Scofield**, 382 US 205, 210 (1965). Since the Board did not seek review of this question and agreed in its brief that Seligman was not an "aggrieved party", the court had no subject matter jurisdiction under either Section 10(e) or 10(f). Both parties concurred in this analysis, but the court did not even address the question of subject matter jurisdiction.

Second, even if the court had subject matter jurisdiction, it was wrong in holding that it was bound to review the merits of the unit determination because the ALJ addressed the question, regardless of whether the determination was necessary to the ALJ's decision, regardless of the pending representation case, and regardless of the parties' stipulation that the matter be decided in the representation case. There is no such requirement in law. A court of appeals has broad equitable jurisdiction to review the Board's decision and "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." Section 10(e) and (f), 29 USC 160(e) and (f). Under this broad power, the court could vacate the Board's unit determination or declare that the determination in this case would not be binding in the representation case. Contrary to its past authority recognizing that the court has equitable discretion in deciding whether to enforce a Board order, **NLRB v Brown Lumber Co**, 336 F2d 641, 645 (CA 6 1964), the court did not recognize its discretion in this matter. **Cf. UAW v Scofield**, 382 US 205, 211-212 (1965). And in light of the parties' stipulation to contest the unit determination in the representation case, it would be an abuse of discretion to decide the question in this case.

The Court of Appeals' cursory discussion of this question constitutes an implicit decision on an important question of federal labor law which has not been addressed by this Court.

Admission Of Record
From Representation Case

With regard to the admission of the transcript, exhibits, and decision from the representation case in this case, the Court of Appeals did not even discuss the important questions raised by Seligman. It simply said that "[t]he Board need not permit complete relitigation of the unit determination issue." Slip Opinion, p 3; A 3. It cited a single case that held that the record from a representation proceeding "could" be incorporated into the record in an unfair labor practice case and "may be accorded 'persuasive relevance' ". **Amalgamated Clothing Workers** v **NLRB**, 365 F2d 898, 905 (CA DC 1966). This, however, misses the point. The ALJ did not hold that she was exercising her discretion to admit the record of the representation case and did not cite any reasons of convenience or probative value. Rather she held that she was **required** to admit the proffered record regardless of its hearsay nature and regardless of the fact that virtually all of the witnesses who testified in the representation case were available to testify in this case. In affirming this decision the Court of Appeals again blurred the distinction between required and discretionary acts.

The admission of the representation case record was prejudicial and unwarranted for several reasons. First, the transcript is inadmissible hearsay. Unfair labor practice proceedings are governed by the Federal Rules of Evidence so far as practicable. Section 10(b), 29 USC 160(b). The transcript is clearly hearsay since it was offered as a substitute for the testimony of the witnesses. In other words, the statements were offered to prove the truth of the matter asserted in them. This is inadmissible hearsay. FRE 801(c), 802. The only time that prior testimony is admissible is when the declarant is unavailable as a witness. FRE 804(b)(1). That was not the case here.

The admission of the transcript resulted in the ALJ's inability to assess the credibility of the witnesses by judging their demeanor. The transcript itself contains much that would be inadmissible hearsay. In fact, much of it contains argument concern-

ing such inadmissible hearsay.

Another reason why admission of the representation case record was prejudicial is that counsel had no opportunity to object to testimony or contemporaneously cross-examine witnesses under the stricter standards that apply in unfair labor practice cases. An unfair labor practice case is an adversary proceeding before an administrative law judge governed by the same rules of procedure and evidence that apply in United States district courts. Section 10(b), 29 USC 160(b). Each party has the right to "conduct such cross-examination as may be required for a full and true disclosure of the facts." 29 CFR 101.10(b)(2).

A representation proceeding is far different. It is "nonadversary in character". 29 CFR 101.20(c); **NLRB** v **Fresh'nd-Aire Co**, 226 F2d 737, 740-741 (CA 7 1955). The hearing officer in a representation case is not a qualified administrative law judge and need not even be an attorney. 29 CFR 101.20(c). Board regulations explicitly provide that the rules of evidence do not control. 29 CFR 102.66(a). The hearing officer in this representation case repeatedly stymied Seligman's efforts to cross-examine witnesses, stating that if Seligman had better information, then it should present its best evidence. Perhaps the most significant difference between the representation case and this unfair labor practice case is the hearing officer's ruling that credibility of a witness was not an issue in the representation case and could not be explored on cross-examination.

The General Counsel attempted to justify his introduction of the representation case record by arguing that the Board could take judicial or administrative notice of its proceedings. Judicial notice was not applicable here. First, it is not uniformly agreed that courts may take judicial notice of other proceedings. **NLRB** v **Daniels**, 202 F2d 579, 586 (CA 6 1953). Even the authorities that permit judicial notice of other proceedings distinguish between noticing the existence of the proceedings, which may be proper, and using the contents to prove the truth of the matters asserted there, which is entirely different. **Trans World Airlines, Inc** v **Hughes**, 308 F Supp 679, 684 (SD NY

1969), rev'd on other grounds, 449 F2d 51, 67 (CA 2 1971. Most importantly, the rules of evidence limit judicial notice to facts "not subject to reasonable dispute". FRE 201(b). The facts asserted in the representation case testimony were obviously disputed.

Finally, the Regional Director's decision in the representation case was inadmissible for several reasons. First, it was not even a final decision. The request for review was and still is pending. Second, the decision was based on a record that contained substantial hearsay testimony that would not be admissible in an unfair labor practice proceeding. Third, the decision is itself hearsay. Fourth, since the ALJ recognized that she was not bound by the decision, it has no evidentiary value at all. It is simply another person's opinion on a question on which the ALJ recognized she would make an independent decision.

The Court of Appeals' error in its four-sentence discussion of admission of the representation case record is that it does not even acknowledge the arguments above or apply the proper law under the rules of evidence. Its blithe approval of the admission of a record created in one proceeding under entirely different standards implicitly abridges the statutory standards governing unfair labor practice proceedings. This involves an important question of federal labor law having wide application to the many unfair labor practice proceedings that are conducted by the Board. It is a question not addressed by any decision of this court and one on which a clear statement of standards is needed to give guidance to the lower courts and to the Board.

Affirmative Defenses
Against Younce Charge

The charge was filed on April 7, 1977, the last day before the expiration of the six-month limitations period in Section 10(b), 29 USC 160(b). The only service was made on the resident manager at the complex where the Younces formerly worked. The statute and Board regulations require service personally, by registered or certified mail, by telegram, or by leaving a copy at

the principal office of the person to be served. Section 11(4), 29 USC 161(4); 29 CFR 102.111(a).

The ALJ's decision found that Seligman's principal place of business is 24315 Northwestern Highway, Southfield, Michigan, and this was designated as the employer's address on the charge itself. Service at another location does not meet the statutory requirement.

The Court of Appeals relied on **NLRB** v **Clark**, 468 F2d 459(CA 5 1972), to support its conclusion that service was effected during the limitations period. **Clark**, however, stated that, if an employer is engaged in several enterprises, it would be exceedingly technical and precarious to require the server to determine the "most important" or "principal" office. Here there was nothing precarious or obscure in determining the principal place of business. Seligman had only one office address and one office. It had no office at the complex where the Younces had worked. Thus the Court of Appeals' ruling is wrong as a matter of law.

The Court of Appeals also found there was no waiver of the Younces' charge. This was in spite of the three-page affidavit signed by Susan Younce, her letter to the Board stating that she had come to "a happy agreement" with Seligman, and her testimony to the same effect.

The Board failed to consider any of these facts of express waiver. Its decision missed the point when it merely said that the withdrawal of a charge does not waive the claims. Seligman's waiver argument is not merely based on the withdrawal of a prior charge but rather on the express waiver in writing and orally on numerous occasions. The Court of Appeals' finding of no waiver is simply contrary to all of the evidence in the record.

The order for reinstatement or back pay for the Younces is in any event barred by estoppel. The Younces admitted they were offered reinstatement with back pay and rejected this offer one month after termination on the ground that they wanted to drop

their charges, had other jobs, and did not want reinstatement or back pay. Seligman promptly took corrective action on the initial charge and communicated its reinstatement offer directly to the Board agent who in turn communicated it to the Younces. Seligman reasonably relied on the Younces' rejection. The order now for reinstatement or back pay would severely damage and prejudice Seligman. It discourages voluntary efforts to correct the effect of possible unfair labor practices. This matter was not discussed at all by the ALJ or Board decisions and was dismissed by the Court of Appeals in one sentence.

The summary rejection of these substantial defenses to the Younce charges is such a departure from proper judicial review as to call for an exercise of this court's power of supervisions.

Numerous Findings Are Unsupported By Substantial Evidence

The standard of review for a court of appeals in a labor case is clear. The court must set aside findings not supported by "substantial evidence on the record considered as a whole". Section 10(f), 29 USC 160(f). In judging whether a factual finding is supported by substantial evidence, the court must review the entire record and "take into account whatever in the record fairly detracts from" the Board's conclusion. **Universal Camera Corp v NLRB**, 340 US 474, 488 (1951). An examination of the record, however, reveals the Court of Appeals approved findings that are contrary to the great weight of the evidence.

Unit Determination

This error is particularly evident in the unit determination. The ALJ decision itself explicitly acknowledged that the 21 complexes found to be an appropriate unit are owned by separate legal entities. A 43. The decision acknowledged that the complexes are located all over the Detroit area, some as far as 60 miles apart, that they are of various sizes and serve tenants of varying economic status, that some are HUD regulated and some are not, that Seligman keeps separate accounts for each

complex, and that the on-site managers hire and fire employees and determine their specific wages. A 43.

The Board's decision, and the Court of Appeals' affirmance, relied on the "centralized control" of Seligman over employees in the complexes it manages. A 43; Slip Opinion, p 3, A 3. This "centralized control" is, however, comprised mainly of centrally provided services, such as data processing and purchasing, which are the function of an apartment management company. The crucial matters of labor relations, which alone are appropriate to the unit determination, were explicitly recognized as local matters by the ALJ decision. A 12. It noted that most complexes have their own manager who supervises all aspects of the employees' work at the complex, hires, fires, determines salary, assigns work, adjusts grievances, and disciplines employees. A 12. In view of this acknowledgment on the face of the ALJ decision, the 21-complex unit determination is clearly not supported by substantial evidence. Moreover, there is no Board precedent finding an overall unit for an apartment management company such as Seligman.

Employer-Employee Relationship

A closely related question to the unit determination is whether an employer-employee relationship exists between Seligman and the employees at each complex. It was uncontroverted that each complex is owned by a separate partnership except for two owned directly by Seligman. In the 17 HUD-financed projects, HUD regulations require that on-site personnel be employees of the project owner, not the management company. A 13. Employee wages are paid out of project income, not Seligman's management fee. A 10. As stated above, the ALJ decision explicitly acknowledged that labor matters are controlled by the local resident managers, not by central office employees of Seligman. A 12. Once again, from the face of the ALJ decision, it appears that the crucial facts are contrary to the ultimate decision and the finding of an employer-employee relationship is unsupported by substantial evidence.

Notice Posting

The requirement of notice posting at all 21 complexes is similarly unsupported. To the extent that it depends on the unit determination and the finding of an employer-employee relationship, the arguments above apply. The ALJ's one-sentence explanation of why notice would be required at all 21 complexes mentioned "the nature and extent of the unfair labor practices found" and the fact that they were committed by Seligman's central office project managers and president. A 42. The record, and in fact the ALJ decision, do not support this characterization of the evidence. Almost all of the unfair labor practices found in the decision occurred at two complexes. If a hostile attitude and direction of the unfair labor practices by central personnel were the fact, there would have been charges at even more complexes and the dismissed charges at several complexes would have been sustained. The statement that the unfair labor practices may have been committed by Scott Management Company's president is simply not true. The president was not charged with, nor found guilty of, any unfair labor practice. In sum, the problems were isolated and largely limited to one resident manager who was terminated one month after Seligman first learned of the allegations against him.

The record is silent as to any effect on employees at other complexes. The only witnesses were from the involved complexes and they had hardly any contact with other employees. In light of this, there is no evidence, let alone substantial evidence, to support the finding of pervasive unfair labor practices in all 21 projects which would justify notice posting at all projects.

Other Unfair Labor Practices

Three of the unfair labor practice charges sustained by the Court of Appeals are also similarly unsupported. Space limitations prevent an examination of the evidence in each of those charges, but, in view of the Court of Appeals' failure to properly apply the **Universal Camera** standard in the important matters discussed above, the evidence supporting these charges

should be reviewed as well.

Reinstatement Order

Seligman offered unconditional reinstatement to the involved employees except for one during the unfair labor practice hearing. The ALJ expressly declined to decide whether these were sufficient offers of reinstatement yet recommended an order requiring reinstatement and posting a notice of the reinstatement. A 43. The Court of Appeals stated there was only "partial compliance" with the reinstatement order. Slip Opinion, p 4; A 4. The error here is two-fold.

First, the Board cannot order Seligman to do what it has already done. Reinstatment is moot. Nor can the notice imply that Seligman has not already offered reinstatement, because this is simply untrue.

Second, the Court of Appeals, in finding "partial compliance", appears to review a factual finding not made by the Board below. The ALJ expressly declined to decide whether there was compliance. The Court of Appeals does not confront the inconsistency between the Board's abstention from deciding whether the reinstatement offers were adequate and an order requiring reinstatement.

CONCLUSION

For the reasons stated above, the petitioner prays that the court grant its petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and deny enforcement of the Board's order.

Respectfully submitted,
HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN

By: _____
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June , 1981